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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-77

DOUGLAS JAMES FARRELL AND
MARK ALBERT ROY,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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No. .....

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Respondent.

PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TO THE SUPREME COURT OF THE UNITED STATES:

Petitioners pray that writs of certiorari issue to review the judgments of the United States Court of Appeals for the Ninth Circuit affirming the judgments of the United States District Court for the Central District of California, convicting the petitioners for a violation of the Universal Military Training and Service Act and sentencing them to the custody of the Attorney General.

1. OPINION OF THE COURT BELOW

The opinions of the United States Court of Appeals are not yet reported. They are set forth as Appendix A to this petition. Farrell's is pp. A1 & A2; Roy's is p. A3.

2. STATUTORY PROVISION SUSTAINING JURISDICTION

The judgments of the Court of Appeals were entered on June 15, 1971 and June 16, 1971, Appendix B, denials of Petitions for Rehearing: Farrell's is p. A4; Roy's is p. A4.

This Petition for Writs of Certiorari is filed within the required thirty days time.

The jurisdiction of the Court rests on Section 1254 (1) of the Judicial Code, 28 U.S.C. The District Court had jurisdiction under U.S.C. § 3231.

3. QUESTIONS PRESENTED AND HOW RAISED

The Motions for Judgment of Acquittal and the briefing in the Court of Appeals raised the following questions including the one of late crystallization of conscientious objector, considered by this Court in *Ehlert* v. *United States*, 91 S.Ct. 1319 (1971).

A. These petitioners question the validity of the explicitly stated basis given by this Court for *Ehlert*. Petitioners present herein a detailed affidavit of fact and over two dozen court opinions to show that the Court's-stated basis had no basis in fact, *when* the decision was made.

B. Whether *Mulloy* v. *United States*, 398 U.S. 410 (1970), requires a reopening of a registrant's classification postured as petitioner.

Put more pointedly whether the recognition by the Department of Defense that its DoD 1300.6 should be

amended to bring military practice to a state of consistency with this Court's prophylactic and prophetic *Ehlert* decision, supra, of April 21, 1971, gives protection to men, like these petitioners, who when they were administratively processed did not have a forum available.

4. STATUTES AND REGULATIONS INVOLVED

Involved are the Fifth Amendment and 32 C.F.R. § 1625.2. They are set forth in Appendix B.

5. STATEMENT OF THE CASES

The indictment charged Farrell with a violation of the Universal Military Training and Service Act for refusing to submit to induction [CT. 2].

Farrell pleaded "not guilty" and was tried by the Honorable William P. Gray, District Judge, sitting alone without a jury. He was found guilty and given a two year sentence [CT. 24], and is on bail pending appeal.

A written Motion for Judgment of Acquittal had been filed during the trial [CT. 20].

The indictment charged M. A. Roy with a violation of the Universal Military Training and Service Act for refusing to submit to induction [CT. 2].

He pleaded "not guilty" and was tried by the Honorable Jesse W. Curtis, District Judge, sitting alone without a jury. He was found guilty and given a three year sentence [CT. 31], and is on bail pending appeal.

A written Motion for Judgment of Acquittal had been filed during the trial [CT. 23].

6. FACTS

The facts of Farrell are found in the complete Selective Service System file of the appellant [Ex.]*

James Douglas Farrell registered with Local Board No. 62 in Beloit, Wisconsin on October 14, 1970 [Ex. 1]. Afterwards he was placed in various classifications by the Selective Service System [Ex. 11-12]. He was classified II-S on November 18, 1963. He was classified II-A on March 21, 1966. He was classified I-A on November 13, 1967. He filed his conscientious objector claim, for the first time, after he was sent an Order to Report for Induction.

He refused induction on August 14, 1968 [Ex. 109].

The facts of Roy are found in the complete Selective Service System file [Ex. .....]*

Petitioner Roy registered with the Selective Service System on March 22, 1966 [Ex. 1]. He was classified I-A by his Local Board on September 6, 1966 [Ex. 3].

Roy was ordered to report for induction on December 10, 1968 [Ex. 35].

On December 2, 1968, he sent the following letter to his Local Board:

"Gentlemen

I would like the conscientious objector form. I will fill it out and hand it in today. I *have made up my mind on this.*

Also I ask that my classification be reopened and that you consider my claim.

---

*This file, Government's Exhibit, is pencil paginated at the bottom of each sheet and is hereinafter referred to by the sheet number, such as [Ex. 1].

I would also like to meet the board and ask that my induction be postoned [sic] for if not, I will follow my conscience." [Ex. 56].

Roy presented SSS Form 150 to the Local Board. In that form he presented a prima facie case for a I-O conscientious objector classification [Ex. 37-44].

The Local Board refused to grant him the I-O classification and refused to reopen [Ex. 47].

He reported for induction, but refused induction, on May 13, 1969 [Ex. 50].

7. REASONS FOR GRANTING WRIT

The Court should consider anew its *Ehlert* decision because the explicit reason for the Court's conclusion was without sufficient factual basis.

8. ARGUMENT

POINT ONE

Ehlert Should Be Reviewed. Ehlert Explicitly Turned on a Factual Assumption That Was Without Basis-in-Fact

This Court said in *Ehlert*:

> "We are assured, however, by a letter included in the briefs in this case from the General Counsel of the Army to the Department of Justice, that present practice allows presentation of such claims and that there thus exists no possibility that late crystallizers will find themselves without a forum in which to press their claims. *Our conclusion in this case is based upon that assurance.*" 91 S.Ct. 1319, 1324-1325. (Italics supplied)

A. There is overwhelming judicial pronouncement of "facts", in context, that shows this "assurance" did not comport with reality at that time, among other things that

late crystallizers discovered that the military would not lend its ears to them and that they truly were without a forum.

B. Additionally, counsel attaches to this petition his affidavit that relates his own recent experience in this area of military conduct. It shows that the above and other most serious aberrations were frequently present, so frequently that counsel has no hesitancy in presenting this affidavit against the hearsay "assurance" based on nameless, faceless informants. It, and a supplement are set forth in Appendix C to this petition.

A.

There Is Overwhelming Judicial Opinion That the Factual Basis for This Court's Decision Was Unfounded and That the Language of Both the DoD 1300.6 and the AR 635-30 Was Uniformly Considered Plain, and That There Was No Ambiguity, and Must Be Followed

All judicial experience supports this claim of petitioner. If the Court intends to overrule all the courts below on this point as it has already done in one area of *Ehlert* [with respect to those judges who support the uncontrollableness of conscience in relation to the "crystallization" doctrine] it is respectfully suggested that an explicit pronouncement would be in order, as in *Estep* v. *United States,* 327 U.S. 114 where the concurring opinion of Mr. Justice Frankfurter cataloged such an explicit repudiation of all Court of Appeals judges, but one (f. 1, pp. 138-139).

We present, in this portion of our petition, the determinations of over two dozen courts that support our thesis. They contradict the "assurance" passed on to this Court by the General Counsel of the Army.

What governs procedures in the Army? The ARs, the army regulations. How much weight should the Court give a letter from the General Counsel, based on reports to him, augmenting the record?

On a battlefield a recognized means of communication, in small units is "Pass the Word." If the General Counsel adds "I'm Passing the Word" then a little more weight is to be given his good offices. In army officer groups a well recognized means of communicating is "Pass the Word."

But what has been, and what *is*, the practice of the army in our context? A little history is desirable for the light it throws.

In conscientious objector matters, *before* the 1968 amendment to DoD 1300.6, Pass the Word resulted in sabotage to the AR 635-20 as is to be seen from counsel's attached affidavit, ¶7. The sabotage is why the 1968 amendment was made by the Secretary of Defense.

Since the record may be augmented by hearsay (from sources deemed reliable) we invite attention to our affidavit, attached to this petition. In the context of the argument being now made we quoted the following portion of the affidavit:

The Central Committee for Conscientious Objectors is an organization largely operated by Quakers, and one that has had the respect of all concerned: Pentagon, Selective Service System, historic peace churches, etc. It has had a vast quantity of experience in these conscientious objector matters for a generation. In its publication "Handbook, for Conscientious Objectors", Eighth Edition, Third Printing, December, 1966, re DoD 1300.6, we read:

> "Although many men were discharged on grounds of conscience during 1964 and 1965, since the spring of

1966 virtually all applications have been denied regardless of merit." [82]

In its Ninth Edition, Second Printing, January, 1968 it saw no reason to alter the above statement and repeated it verbatim.

In its Eleventh Edition, September, 1970 it reported "About 70% of the applications for noncombatant status and about 20% of the applications for CO discharge are approved. Some unsuccessful applicants are discharged on other grounds." [93]

Evidently, the 1968 Amendment to the DoD improved the situation. What brought about the amendment and what were its new provisions?

1. Whereas, in 1964 and 1965 "many" of applicants for an AR 635-20 discharge were successful, Pass the Word reduced it to denials of "virtually all applications" in 1966 and 1967.

See counsel's affidavit of how this was done.

2. This sabotage, and the attendant outcry and pressure on the Pentagon brought the 1968 DoD 1300.6 amendment. *Thereafter* (1) the applicant's commanding officer was not to be his hearing officer; (2) a knowledgeable officer, 03 (captain) or higher was to be the hearing officer and (3) the applicant could have private counsel at the 03 Hearing. These changes clearly meant that the Department of Defense wanted the applicant to have a fair hearing.

The following, recent court opinions emphasize our claim that the standards for discharge are governed by the plain and clear mandate of DoD 1300.6 and AR 635-20 *and also show* that for some reason, despite the amended DoD 1300.6, a considerable proportion of the military 03 hear-

ings are still conducted (1) by officers *in the chain of command* [forbidden], (2) officers *not* knowledgeable [forbidden]; (3) and that the courts *uniformly* have used the plain standard of the DoD and the AR namely, that the conscientious objections must not have become "fixed" before the enlistment or induction ceremony.

[These cases are in alphabetical order; all italics are supplied]

Bachman v. *Bradley,* No. 2673 .(W.D. Mo. Jan. 5, 1971), 3 SSLR 3948

> "And further, he states:
>
> > *'In the past months* of my active duty service, *I have recognized* that the realities of Army life and functions *are irrevocably in conflict* with my convictions and beliefs.' " [3948]

Baker v. *Laird,* 316 F.Supp. 1, N.D. Calif. (1970)

> ". . . *the army could deny* an application for discharge to one claiming to be a conscientious objector where his application reveals that the grounds and beliefs adduced in support thereof *are identical with those shown to have pre-existed* induction. . . ." [4]

United States ex rel. Barr v. *Resor,* No. 23815 (D.C. Cir. March 31, 1971) 3 SSLR 3999:8

> *"Barr never submitted a claim* for exemption from all military service to *his Selective Board. The Army Board's determination* that Barr's application was governed by paragraph 3b(2) of *AR 635-20 was* therefore without basis in fact and habeas corpus was properly granted." [3999:10]

Bates v. *Commander, etc.,* 413 F.2d 475 (1969) 1 Cir.

> "The Commandant's initial findings implicitly attack the petitioner's sincerity. But by holding that petitioner's present claim is inconsistent with his prior vol-

untary enlistment, the Commandant puts him in a 'hanged if he does, hanged if he doesn't' predicament. *Under DoD Directive 1300.6 IV B2, conscientious objection will not be considered unless it arose after* induction or enlistment. By the Commandant's reasoning, therefore, petitioner's claim cannot be considered if it arose prior to his enlistment and is evidence of insincerity if it arose afterwards. By the force of this logic, no member of the armed services could ever qualify as a conscientious objector." [478]

Bohnert v. *Faulkner,* 6 Cir., 438 F.2d 747 (1971) .

". . . the Department of Defense provides for in-service discharge for conscientious objectors and requires that *such beliefs must have been acquired after* the enlistee entered the service, the timing of the request for discharge supports no more than an inference insufficient alone to constitute a basis in fact for doubting sincerity." [754]

Bortree v. *Resor,* D. of Col. 1970, 316 F.Supp. 93

"In accordance with Army Regulation No. 635-20, the petitioner was interviewed by . . . Captain H. J. Nitko[1], an officer in the Army *who is knowledgeable* in policies and procedures relating to conscientious objector matters; [f. 1-1. 'Originally Captain Thomas M. Duszynski had interviewed the petitioner, but he was disqualified by Headquarters, Department of the Army, since he was in the petitioner's *chain-of-command.*']"

Bortree v. *Resor,* No. 24607 (D.C. Cir. Mar. 2, 1971) 3 SSLR 3788

"Moreover, all indications are that *these officers did not have legally sufficient grounds for their recommendations.* Captain Nadwodny was *Bortree's unit commanding officer* at Fort Dix and presumably had some contact with him, but he did not interview Bortree concerning his application for discharge." [3792]

United States ex rel. Brooks v. *Clifford,* 400 F.2d 700 (1969) 4th Cir.

> "Indeed, the administrative procedures were devised for the very purpose of permitting the assertion of a claim of conscientious objection . . . *when the objection was not formulated until after* military service had begun." [707]

Cohen v. *Laird* No. 69-1085 (D. S.C. June 26, 1970) 3 SSLR 3875

> "Yet, it was *during this very period* of his basic training that he asserts *his convictions 'crystallized.'*" [3877]

Application of Corvell, 307 F.Supp. 209, N.D. Calif. (1969)

> ". . . *preclude granting discharges* to those . . . whose beliefs *pre-dated* but were not claimed prior to *active duty.*" [212]

Donham v. *Resor,* 2 Cir., 436 F.2d 751 (1971)

> [On the requirement that the *Hearing Officer be knowledgeable* only one opinion is known to counsel *where the decision turned on this,* the Court finding that the Hearing Officer (a Colonel Gleason, at West Point) was *not knowledgeable in context.*] [754]

Goodwin v. *Laird,* 317 F.Supp. 863, N.D. Calif. (1970)

> ". . . he has adequately explained how and why *his beliefs became fixed after* entry to the service." [866]

Gordon v. *Resor,* S.D.N.Y., 323 F.Supp. 268 (1970)

> "The armed forces naturally focus their attention on conscientious objection *crystallizing after induction,* leaving cases of earlier crystallization to the jurisdiction of the Selective Service System. Ehlert v. United States, 422 F.2d 332 (9th Cir. 1970); Hammond v. Lenfest, 398 F.2d 705 (2d Cir. 1968); United States v.

Gearey, 368 F.2d 144, 149-150 (2d Cir. 1966); cert. denied 389 U.S. 959, 88 S.Ct. 335, 19 L.Ed.2d 368 (1967); DoD 1300.6, supra." [270]

Grossman v. *Fallwell*, No. 21429 (D. Md. Nov. 28, 1969) 3 SSLR 3977

> "All three of the line officers then (Captain Smith, Captain Clark and Lieutenant Colonel Gettings) concurred in the following critical finding:
>
> 1. That petitioner was sincere,
>
> 2. That his convictions were motivated by religious beliefs, and
>
> 3. That *they became fixed after he went in the Army.* In the face of those conclusions reached by those Army officers who were closest to petitioner, and who had personal contact with him, it is indeed difficult to understand how the Review Board could make diametrically opposed findings." [3979]

United States ex rel. Healy v. *Beatty*, 424 F.2d 299, 5th Cir. (1970)

> ". . . the objection itself *must so manifest itself and not exist prior to entry on active duty.*" [302]

Helwick v. *Laird*, 5 Cir., 438 F.2d 959 (1971)

> "Rather, the requirement of AR 635-20 (3) (b) is that the objection itself—the objection to participation in war in any form—*must become fixed only after entry into the Army.*" [966]

Keil v. *Seaman*, D. Md., 314 F.Supp. 816 (1970)

> "Nor does this Court find any basis in fact for concluding that Keil's beliefs were not sincerely reached and held, or *that they did not become crystallized and fixed until after* his induction into the Army." [822]

Kepple v. *Laird*, 319 F.Supp. 1342, D. of C. (1970)

After citing AR 635-20, ¶2b on page 1344 the court concluded:

"There is no showing that Kepple was under any compulsion to enlist in the Army and *no evidence* to overcome his claim that his convictions as to *conscientious objection had not matured at that time.*" [1345]

La Manna v. *Laird*, W.D. Tex., 322 F.Supp. 1289

"The case of United States ex rel. Healy v. Beatty, supra, is in point. There it was argued that Healy's religious beliefs did not change and did not 'develop subsequent to entry into the active military service.' In fact, Pvt. Healy conceded this. However, this loses sight of the fact that 'the Regulations speak of the development of conscientious objection to the participation in war "in any form" *after induction*'; that is to say, participation in such noncombatant service as the Medical Corps." [1292]

Lovallo v. *Resor*, No. 71C48 (E.D. N.Y. Feb. 4, 1971), 3 SSLR 3874

"His experiences in the Army, according to his statements, served to increase his adversion [sic] to violence and warfare. The personal contacts he made and the exposure to new points of view in the 26th Army Band had a further significant impact on his thinking: '. . . [G]radually *my conscience assumed a new depth of commitment* to the beliefs that I had long before internalized.' AHBCA-BA at p. 6. He became active in the Staten Island Peace Coalition which along with the reported events at Mylai further deepened his commitment." [3874]

McMahan v. *Laird*, S.D. Cal., 320 F.Supp. 485 (1970)

After citing DoD 1300.6 and Bupersnote 1900 dated August 24, 1970 the court concluded "Clearly, petitioner has more than satisfied his burden. . ." [489]

O'Connor v. *McKean*, No. 70-93 N.D. Ala. (May 5, 1970), 3 SSLR 3498

> "Army Regulations 635-20 2.b. (1) provides for consideration of applications for discharge when the conscientious objection develops subsequent to entry upon active military service, but *specifically excludes from consideration* requests based solely on conscientious objection *which existed, but not claimed, prior* to induction. This same philosophy expressed in the comparable Selective Service Regulations has been approved by the Courts. Keene v. United States, supra; Nellons v. United States, 1 SSLR 3144, 399 F.2d 295 (5th Cir. 1968). There is no reason the Army Regulation should not be given the same treatment." [3500]

Polsky v. *Wetherill*, 438 F.2d 132, 10th Cir. (1971)

> ". . . Polsky was in fact a sincere conscientious objector but that his beliefs in such regard *had not crystallized during military service* but were existent at the time of Polsky's voluntary enlistment." [133]

Rabbito v. *Larson*, No. 70-572, N.D. Calif. (Aug. 19, 1970), 3 SSLR 321

> ". . . *hearing officer denied* petitioner's claim because his application is based solely on conscientious objection *which existed but was not claimed prior* to his coming into military. . . . Petitioner's application in some detail describes how and why his beliefs became fixed after entry to the service." [3212]

United States ex rel. Sheldon v. *O'Malley*, 420 F.2d 1344, C.A. D.C. (1969)

> "The general policy is stated to be that *consideration will be given* to separation requests '*when* such conscientious objection *develops subsequent to entry* into the active military service.' " [1345]

United States v. *Sigmon*, CM 416356 (Board of Review, U.S. Army, Jan. 2, 1968), 1 SSLR 3054

> "The only factual questions . . . (1) Did the appellant actually attempt to apply for a discharge; and (2) Did his beliefs arise *subsequent* to his entry on active duty." [3055]

Stehling v. *Casey*, No. 70-C-104 (W.D. Wis. Jan. 22, 1971), 3 SSLR 3912

> "He stated that his view *had not begun to crystallize until* he had *been activated* as a National Guard member for riot duty on the University of Wisconsin campus. He stated that he was a Roman Catholic at the time of the application, that he had been raised a Catholic and had attended 'a seminary for three years,' but that 'the full impact of the [Christian] concept' of the brotherhood of man had 'never really dawned' on him until the guard duty during the campus disturbance. He referred to a sermon on brotherhood and to certain experiences during his attendance at a National Guard summer camp. He said that 'attending the seminary for three years deepened my religious beliefs,' but that his conscientious objection had not solidified until years later, shortly before the filing of his application." [3912]

Talford v. *Seaman*, 306 F.Supp. 941, D. Md. (1969)

> ". . . he did not realize the incompatability of his religious beliefs and war in any form, until after his entry into the service."
>
> * * *
>
> "There remains the *issue* of whether Talford's views *became fixed before entry* into the service." [945]

POINT TWO

The Army Couldn't Be Counted on to Follow the (Really Prospective) Guidelines of Its General Counsel

Army practice, in context, is often far different from even the printed regulations; also, relief thereafter encounters built-in, unnecessary dead-ends.

1. "Knowledgeable" Hearing Officers [a requirement of DoD 1300.6 and repeated in AR 635-20] are not always assigned to conduct the "03 Hearings." See Affidavit of Counsel attached hereto, made part hereof by reference and marked Appendix "C", first several pages.

2. Administrative relief opportunity after the 03 Hearing is almost a mockery. Court relief from arbitrary decision is unnecessarily hazardous because records turn out to be inadequate-to-poor.

a. "Reporting" must be done at the expense of the applicant, if and when permitted and tape recording is now generally prohibited. See Affidavit of Counsel attached hereto, made part hereof by reference and marked Appendix "C", next several pages.

b. Completely favorable reports of the "03 Hearing Officer" have been arbitrarily rejected by superior officers who never saw the applicant. See Affidavit of Counsel attached hereto, made part hereof by reference and marked Appendix "C", page A9.

c. On the other hand relief opportunity from the Selective Service System denials is readily available, and is generally granted when indicated. See Affidavit of Counsel attached hereto, made part hereof by reference and marked Appendix "C", page A10.

Assuming it is concluded that the above listed arguments are considered sufficiently supported by the affida-

vit and by the reported cases we believe it follows either that the military remedy relief route has been devoid of fairness to inductees, or, in the alternative that a no-man's land existed. Therefore a writ is now justified on the proposition that either the civil court remedies should be left available to late-filing conscientious objectors or petitioner, not having available a forum, should have his conviction reversed.

We believe we have disposed of the *validity* of the "assurance" given by the Army's General Counsel in Point One and Point Two, above.

A.

We now present facts and arguments to remove, what we respectfully assert, is a related misconception in the Court's opinion, one stated in the same paragraph as its explicit reliance on the Army General Counsel's "assurance." The opinion says:

> "As for the absence of any no man's land, the pertinent military regulations are somewhat inconsistent in their phrasing, perhaps because of the sharp division among the court of appeals."

First, we argue that to the military there was nothing inconsistent in the AR's phrasing.[1]

We read these subsections of the regulation, as the military have always read them as meaning:

---

1. The AR's provisions we refer to are set forth in the opinion's footnote 10. Subparagraphs a and b of ¶3, we submit, are merely repetitious. We italicize to emphasize our reading.

"10. See Army Regulation No. 635-20, ¶3:

'a. *Consideration will be given* to requests for separation based on bona fide conscientious objection to participation in war, in any form, *when* such objection *develops subsequent* to entry into the military service.' "

1. Sub (a) says "consideration will be given. . ." [only] "when such objection develops subsequent to entry. . ."

2. Sub (b) says: A man who didn't timely present existing conscientious objector belief to his draft board is S.O.L., the army's oral characterization. We translate this S.O.L. expression to mean: Surely out of Luck.

Second, the synopses of the 30 court opinions, *supra*, involving over two score judges plus our own affidavit show the military practice and give added support to our "First" argument, immediately above, that no ambiguity existed *to the military.*

B.

A parallel consideration of the last two versions of the afore-quoted portion of AR 635-20 shows that the Army has tried to pay lip service to this Court's pronouncements.

Attention is invited to the AR 635-20 dated 31 July, 1970. It is headed:

PERSONNEL SEPARATIONS
CONSCIENTIOUS OBJECTION

Effective 15 August 1970

This revision is necessary to reflect the recent change from "religious beliefs" as the basis for requesting separation from the service for conscientious objection to "deeply held moral, ethical or religious beliefs."

This heading is obviously a prompt and good start toward implementation of *Welsh* v. *United States*, 90 S.Ct. 1792 (June 15, 1970) *but;* when we turn the first page for details under ¶ "4. . . Procedure. . .

"(1) General Information. . ." [we come to]

"(2) *Religious Training or beliefs held.*

(a) A description of the nature of belief which is a basis of claim.

(b) Explain how, when and from whom or from what source the applicant received the training and acquired the belief which is the basis of claim."

We submit that this demand for details [with the word "*religious*" in the heading for the sub-paragraphs] has been and is coercive and misleading, and in substance gives the anxious applicant for separation the same Procrustean bed as did the pre-*Welsh* version of the AR, dated 27 May 1968.

In summary of this point:

A. Previously, in *Taggart's* petition (filed June 25, 1971) it was argued:

"Perhaps the military may change the AR to conform to *Ehlert* (even as the 1968 version did belatedly bow to *Seeger* v. *United States,* 85 S.Ct. 850 (1965)) by omitting (a) of (2) [which had read 'Do you believe in a Supreme Being'] and substituting the current question '(2) (a) A description of the. . .'

"We submit that conjectures about the future are out of place.

"We call the current AR 635-20 coercive and misleading because *Welsh removed* a showing of 'religious' training and belief as a necessity for qualifying whereas the current AR certainly implies that the nature of the belief, and its source, better be religious, or else . . .

"Until the Department of Defense directs that all the armed services change their regulations (by whatever

names known) to comply with the 'assurance' given the Court by the Army's General Counsel no one can advise a man in any of the armed services that his claim for a conscientious objector type will be honored if consultation reveals that anything exists to show he had such belief before enlistment or induction.

"Annexed to this petition is a Supplemental Affidavit that recites the experience of counsel at a Marine Corps conscientious objector hearing on May 22, 1971. In it are recited a number of denials of due process, chiefly ones of impermissible status of and incorrect conduct by the Hearing Officer.

"On June 16th, events in this marine's case took a not infrequent turn: evidently recognizing one or all of the irregularities he was given one day to accept an offer of an Undesirable Discharge.

"We repeat *until* there is a DoD directive ordering all the armed services to follow the assurance of the Army's General Counsel this Court has no basis in fact for its conclusion in *Ehlert*."

B. Now we argue:

1. We are informed (and by reason of long standing reputation for integrity, carefulness and access to Pentagon non-secret plans) of the following and therefore represent it to the Court for its consideration.

> There is word from the Pentagon that a major revision of the Department of Defense Regulation on conscientious objection (DoD 1300.6) is almost completed, having only to clear the General Counsel's office and the Secretary of Defense.

2. The text should be ready in time for the Solicitor General's consideration in his reply Memorandum.

3. This should be satisfactory evidence that, at the time this petitioner received his order to report for induction from the Selective Service System, he had no forum.

Finally, we believe that no conscientious objector should be expected to go into the Army to get out. We have heard of no one, since the present and desperate Professor Billings,[2] who could allow himself to follow such a procedure.

CONCLUSION

1. The Selective Service System affords a fairer remedy to selectees than the military and is a better equipped administrative agency for determining conscientious objections.

2. Also, until the military regulations are changed to conform to the recent expression of the army's General Counsel there has existed, and presently exists, a no-man's-land for laté crystallizing selectees.

3. A writ should be granted, or perhaps the case should be remanded for consideration in the light of the decisions of the last fifteen months.

Respectfully,

.....

J. B. TIETZ,
Attorney for Petitioners

DATED: July 14, 1971

2. *Billings* v. *Truesdell*, 321 U.S. 542 (1944).

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
DOUGLAS JAMES FARRELL,
Defendant-Appellant.

No. 25,629

Appeal from the United States District Court
Central District of California

(Filed May 25, 1971)

Before: BARNES, BROWNING and CARTER, Circuit Judges.

PER CURIAM:

Farrell was indicted and convicted in the district court for violation of 50 U.S.C. App. § 462, refusing to submit to induction into the military service. On appeal, Farrell asserts numerous errors in his classification process. We affirm.

1. *Refusal to Reopen to Consider C.O. Claim.*

Farrell asserts that the local board's refusal to reopen his I-A classification to consider his conscientious objector claim was improper and a denial of due process. Farrell did not assert a claim of conscientious objector status until *after* his induction order had been mailed. Thus, the board was without authority to reopen Farrell's classification under 32 C.F.R. § 1625.2 because crystallization of conscientious objector beliefs is not a change of status resulting from circumstances beyond Farrell's control. *Ehlert* v. *United States* (9 Cir. en banc 1970) 422 F.2d 332, *aff'd* ..... U.S. ..... (1971).

2. *Denial of II-S Classification.*

Farrell asserts that the board improperly denied his request for a II-S (student) deferment. Loyola University notified the local board of Farrell's enrollment. The regulations provide, however, that the *registrant* must make a written request for a II-S deferment [32 C.F.R. § 1622.25]. The local board clerk informed Farrell of the regulation's requirements. Farrell simply did not, at any time, make a written request for the deferment. Soon thereafter, Farrell withdrew from all classes at the university. We cannot find that the board erred, in any regard, by denying Farrell a II-S deferment.

3. *Denial of II-A Classification.*

Farrell contends that the local board was without basis in fact in denying his request for a II-A (occupational) deferment. Farrell was an engineer with specialized technical training, but his employer's letter on his behalf to the board did not assert that he could not be replaced. Accordingly, Farrell did not establish the requisite facts to entitle him to a II-A deferment under 32 C.F.R. § 1622.23. *Wallace* v. *United States* (9 Cir. 1970) 395 F.2d 12; *United States* v. *Kanner* (9 Cir. 1969) 416 F.2d 522. The board's denial was proper.

4. *Constitutionality of Conscription.*

Finally, Farrell asserts that the Selective Service Act violates the Ninth Amendment of the Constitution. This contention is without merit. *United States* v. *Uhl* (9 Cir. 1970) 436 F.2d 773; *Harris* v. *United States* (9 Cir. 1969) 412 F.2d 384.

The judgment of the district court is affirmed.

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellee,
v.
MARK ALBERT ROY,
Appellant.
No. 25412

Appeal from the United States District Court
Central District of California

(Filed May 13, 1971)

Before: KILKENNY and TRASK, Circuit Judges, and PLUMMER, District Judge.*

PER CURIAM:

Appellant was convicted for refusing to submit to induction into the Armed Forces in violation of 50 U.S.C. App. § 462. At the time of argument, his attorney agreed that our disposition of this case would be controlled by the decision of the Supreme Court in *Ehlert* v. *United States*, ... U.S. ....., decided April 21, 1971. The issue in *Ehlert* was decided adversely to appellant's contentions. Consequently, the judgment of the lower court must be affirmed.

IT IS SO ORDERED.

---

*The Honorable Raymond E. Plummer, Chief Judge, United States District Court for the District of Alaska, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
DOUGLAS JAMES FARRELL,
Defendant-Appellant.
No. 25,629

Order

(Filed June 16, 1971)

Before: BARNES, BROWNING and CARTER, Circuit Judges

IT IS ORDERED that the petition for rehearing is denied.

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellee,
v.
MARK ALBERT ROY,
Appellant.
No. 25412

Appeal from the United States District Court
Central District of California

Order

(Filed June 15, 1971)

Before: KILKENNY and TRASK, Circuit Judges, and PLUMMER, District Judge.*

The petition of appellant for rehearing in the above entitled cause is DENIED.

*The Honorable Raymond E. Plummer, Chief Judge, United States District Court for the District of Alaska, sitting by designation.

APPENDIX B

Amendment Involved

V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself; nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Regulation Involved

Section 1625.2 of the Selective Service Regulations (32 C.F.R. § 1625.2 (E. O. 10292, 16 F. R. 9862, Sept. 28, 1961)) provides:

"*When registrant's classification may be reopened and considered anew.*—The local board may reopen and consider anew the classification of a registrant (1) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; or (2) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; *provided*, in either event, the classification of a registrant shall not be

reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252), unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control."

APPENDIX C

AFFIDAVIT OF COUNSEL IN SUPPORT OF PETITION FOR REHEARING

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

J. B. Tietz, being first duly sworn, states:

1. I am counsel of record in this captioned case and was counsel for petitioners in all courts below, trial and appellate.

2. I started practicing law in Ohio, in 1926; and, at all times since 1944 have practiced in my present office at 257 South Spring Street, Los Angeles, California.

3. Since 1944, and for 25 of the last 27 years I have specialized in draft and related military problems, nearly all of these clients claiming conscientious objections to war and to military training.

4. During this 25 year period I have followed the procedures of the eleven armed services (the four regular, and the seven reserve and guard organizations) as carefully as possible, on matters concerning my clients.

5. In 1968 DoD 1300.6[1] was amended in two chief particulars: (1) to take away the initial decision on a man's

1. The Department of Defense Directive referred to in *Ehlert*.

conscientious objections from his immediate commanding officer and (2) to afford him the opportunity to have private counsel: ". . . The applicant will then be afforded an opportunity to appear in person (with counsel retained by him, if he desires) before an officer in the grade of 03, or higher, who is knowledgeable in policies and procedures relating to conscientious objector matters. The designated hearing officer will not be an officer in the applicant's chain of command."

Prior to this amendment, and from the beginning of the Vietnam armed involvement reports came to me from many military installations that DoD 1300.6 was being entirely disregarded, as follows: "An officer took me aside and said 'I'm giving you a friendly tip: the policy here is to grant no c.o. discharges. You are up against a stone wall.' I learned he was telling me the truth."

From 1968 to date my aid to in-service men has included appearing with them at such hearings, ones now universally termed "the 03 hearing."

6. Samples of my experiences are:

a. Most recently, on April 20, 1971, I appeared with and on behalf of Dr. Ralph Hannah at the Armory in Pasadena, California. The hearing officer was an infantry colonel[2] and the four other officers present were either infantry or other non-legal (Judge Advocate General) men, hereinafter referred to in this affidavit as JAG officers. Each was in uniform like the Hearing Officer.

The Hearing Officer was directly on the applicant's chain of command. He answered one of my questions, as follows: "No, this is the first such hearing I have attended."

2. Underscoring denotes a violation of the DoD.

I was forbidden to use my *tape recorder*[3] and was told, "No, you will not get a *copy of my report.*"[3]

b. On April 22, 1971, I was at Fort Ord, Fort Ord, California with and on behalf of PFC Martin Rush, a "Native American" that is an Indian from the historically peaceful Pima tribe.

There I encountered three[4] young JAG officers all sitting as a panel and was told "No, *you cannot use the tape recorder.*"[3]

c. On December 2, 1970 I was at a lawyer's office in Pasadena, California with Lt. Max Bothwell.

The Hearing Officer was an infantry colonel; the man who had appointed him was a colonel in chemical warfare; both were in dress uniform, as was an infantry major. All were in applicant's organization and/or chain of command.

I was *forbidden to use my tape recorder* (it being explained "This would inhibit freedom of expression."); I was told "You *will not get a copy* of my report."

This was the most extraordinary one I have attended in that 95% of all the hearing officer said was in this vein: "You are a most intelligent young man; the army needs you; you can do much for the service if you stay in."

d. I have attended hearings (all since the 1968 amendment, of course) where situations comparable to the above were present such as one at Fort Lewis, Fort Lewis, Washington, where the hearing officer was an infantry major and forbade the use of a tape recorder, one at the Marine Aircraft Wing near Santa Ana, California where the Marine Corps major was

3. Italicizing denotes a grave unfairness.

4. Underscoring denotes a violation of the DoD.

a non-legal officer and in the chain of command but did permit recording.

e. Where the Hearing Officer is favorably impressed, and so declares in a detailed report (with corroborating support in the form of many unimpeachable letters) the applicant still can encounter an abrupt and arbitrary denial of relief by a superior officer, a man who never saw him. See cases cited in Point I, above.

Where relief is thereafter obtained at the trial level [by a persistent soldier and one able to get a lawyer's aid] such cases are generally unreported. For example Bernie Reynolds had a most favorable Hearing Officer report, and a dozen letters from priests and nuns but had to file a petition, in San Francisco, to get his writ of habeas corpus. No. 51576 N.D. Cal.

7. Concerning the sabotage of the initial version of DoD 1300.6. Several clients, from different military installations informed me, during the period beginning in 1966 up to the middle of 1968: An officer said to me I'll give you a tip. You are in a blind alley. The policy here is to turn down all these c.o. applicants.

8. The Central Committee for Conscientious Objectors is an organization largely of Quakers, and one that has had the respect of all concerned: Pentagon, Selective Service System, historic peace churches, etc. It has had a vast quantity of experience in these conscientious objector matters for a generation. In its publication "Handbook, for Conscientious Objectors, Eighth Edition, Third Printing, December, 1966, on page 82 re DoD 1300.6:

"Although many men were discharged on grounds of conscience during 1964 and 1965, since the spring of 1966 virtually all applications have been denied regardless of merit."

In its Ninth Edition, Second Printing, January, 1968 it saw no reason to alter the above statement and repeated it verbatim.

In its Eleventh Edition, September, 1970 it reported "About 70% of the applications for noncombatant status and about 20% of the application for CO discharge are approved. Some unsuccessful applicants are discharged on other grounds." On page 93.

Evidently, the 1968 Amendment to the DoD improved the situation. What brought about the amendment and what were its new provisions?

1. Whereas, in 1964 and 1965 "many" of applicants for an AR 635 20 discharge were successful Pass the Word reduced it to denials of "virtually all applications" in 1966 and 1967.

2. This sabotage, and the attendant outcry and pressure brought the 1968 DoD 1300.6 amendment. *Thereafter* (1) the applicant's commanding officer was not to be his hearing officer; (2) a knowledgeable officer, 03 (captain) or higher was to be the hearing officer and (3) the applicant could have private counsel at the 03 Hearing. These changes clearly meant that the Department of Defense wanted the applicant to have a fair hearing.

/s/ J. B. Tietz
J. B. Tietz
Attorney for Petitioners

Sworn to before me and subscribed in my presence this 18th day of May, 1971.

/s/ William A. Leeds
(Seal) Notary Public in and for the County of Los Angeles, State of California

SUPPLEMENTAL AFFIDAVIT.

This supplemental affidavit is to further show that the current practice of the military is to proceed without legal advice and, in consequence, to ignore the many court decisions interpreting the DoD 1300.6 and its progeny, in this instance the controlling Marine Corps Order, termed M.C.O. 1306.16B.

On May 22, 1971 affiant represented Pfc Elmer Ray Kent at his 03 Hearing at the Marine Air Base, Yuma, Arizona.

The Hearing Officer was a non-legal man (an aviator); also, he was in the chain of command. The "non-legal but aviator fact" was established by the insignia I observed on his lapels and by the way he signed documents that are now part of Kent's conscientious objector application for separation; the "chain of command" fact was his statement to me during the hearing.

The Hearing Officer also stated to me he would "use the chaplain's report and recommendation and the psychiatrist's report and reasoning."

> [This is not permissible: In the case of U.S. ex rel.-Greenwood v. Resor (4th Cir., No. 15,392, April 12, 1971), the Court pointed out that AR 135-25 para 7b, expressly directs that neither the chaplain nor the psychiatrist should make a recommendation for approval or disapproval of an application for CO discharge. Thus the Court could "give no weight to the recommendation of either officer and we disregard whatever weight they were given by the Review Board."]

Also, he stated he would use, as his standard for judgment, Selective Service Systems Dr. Tarr's standard of "training with rigor." This standard is false; there is no

justification in the Act or in *Welsh* for this. It was issued, by the Director [LBM 107 6/July '70 Tarr] right after he was upset by the *Welsh* decision of the Court, June 15, 1970.

We were originally told that this hearing would be at the El Toro Marine Corps Base, a large installation with a legal department. No explanation was given for the change, or why a legal officer wasn't present.

On May 27, 1971 I received a telephone call from Kent and he read me the rejection recommendation of the 03 Hearing Officer: it was based on the incongruity of a man claiming conscientious objection to war when the record showed he had been convicted of possessing marihuana. It incorrectly stated he had been selling it, incorrect in other respects and most important, this and all other items were not mentioned at the 03 Hearing and we didn't know they were being considered. Copy of the Hearing Officer's report is attached. Copy of Kent's letter to affiant is also attached. Attention is invited to Kent's statement that the Hearing Officer interviewed him *before* the Hearing, in absence of counsel, and in defiance of the regulation and fairness. We refer to ¶5 of Kent's letter to affiant:

> "(5) He brings up many things which were not even covered in the hearing which came from conversations we had had before. The whole copy seems to revolve around this rather than the actual hearing."

An affidavit from Kent will be procured, one rebutting the report, if and when further pleadings are in order.

On May 29, 1971 the text of the report and recommendation of disapproval came. It was based on "insincerity". If supported by "demeanor" or by recited, pertinent facts the report would be on solid ground.

There is no mention of demeanor by word or in inference and the facts were immaterial ones such as (1) a conviction on a marihuana charge [partly incorrect]; (2) paper work late, including his letters of reference and, most important *none* of these items were related to us at the hearing and when I questioned the Hearing Officer at the conclusion of it whether he believed the applicant had been frank the officer said "Yes".

I had started the proceeding with his permission, and on my statement "We have the burden and, with the Hearing Officer's approval I will proceed with our case", and, after I covered everything, the officer asked almost no questions.

At the close he said, "You have covered everything" and then went into some generalities.

/s/ J. B. Tietz
J. B. Tietz

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

Sworn to before me and subscribed in my presence by J. B. TIETZ, personally known to me, on May 31, 1971.

/s/ Edward Raiden
Notary Public in and for the
County of Los Angeles,
State of California.

(Seal)

A14

COPY TO KENT

1:JTi:hr
1330
25 May 71

SECOND ENDORSEMENT on Private Elmer R. KENT's ltr 1:JBM:jcp over 1330 dtd 19 May 71

From: Captain James B. MCKENNEY (SSN 425 78 69 65) MSN 09 54 43/1501, USMC

To: Commanding Officer, Marine Training Squadron

Subj: Conscientious Objector Status; request for

1. Returned.

2. It is recommended that Private KENT's application be disapproved.

3. On 23 May 1971, Marine Corps Air Station, Yuma, Arizona, a hearing was conducted with Private Elmer R. KENT and Mr. J. B. Tietz (Attorney at law) present. Private Kent was afforded the opportunity to support his application.

4. It is felt that Private KENT's application is insincere. His application comes at a time when he is awaiting trial by Special Court Martial for an eleven month unauthorized absence. He was arrested 1 October 1970 by civilian authorities for possession of marijuana, selling marijuana, and possession of dangerous drugs. He was tried and convicted on 23 December 1970, served a ninety day sentence and is on three years probation. He stated that he had planned to return and apply for a conscientious objector status but was arrested. Although he claims to have started on the paper work prior to arrest, all his letters of reference are dated after 20 November 1970. It is felt that

while in civilian custody, he decided to apply for this status as a means of evading court martial.

5. Private KENT professes to believe that everyone is God and all people should love each other. His belief was derived from a vision that he witnessed over a year ago on a rainy morning in El Toro. Also he stated that he can no longer perform any job in the military.

6. The Chaplain and Psychiatrist also believe that KENT's application is insincere and a means of getting out of military service.

7. It is further recommended that the Convening Authority proceed with the trial of Private KENT.

J. B. MCKENNEY

27 May 1971

Mr. Tietz,

Here's the copy. I want to go to court with this. I'm confident that I'll be able to pay you your fee. I'm already working on that now.

There are some things which bother me about this copy.

(1) He states that he feels my application is insincere He said at the hearing that he felt I was sincere.

(2) He brings up my civil case stating that I was arrested for Pocess. Maraj., Sales of Maraj. and pocess dangerous drugs. There was no sales involved—that was an intent to sell charge—besides it was dropped and so was the pocess dangerous drugs. I feel he's slighting me here and building ground for prejudice against me.

(3) A remark about my claiming to have started my application prior to arrest. I have my receipts and

things which you gave me at the time I first came to visit you.

(4) I was not tried and convicted on that civil charge. I was black mailed and coerced into a plea of guilty.

(5) He brings up many things which were not even covered in the hearing which came from conversations we had had before. The whole copy seems to revolve around this rather than the actual hearing.

(6) "His belief was derived from a vision that he witnessed over a year ago on a rainy morning in El Toro." I did not derive my belief from that. That was only a conformation or understanding. Sort of like the key that opened the door. Also I don't believe I said rainy morning because it was at night and I don't think it was raining. I believe I stated that it occurred about the same time of year as when Calif had that storm which caused rain for 13 days straight.

That's about all I can think of right now. When you reply can you give me some idea of the length of time—(like a tenative time table) for this proceeding. That will give me a frame work to work with in on financing this. I believe I can collect the money soon.

Thank You

/s/ Elmer R. Kent

P.S. They were supposed to have my hearing at El Toro. There was supposed to be a Colonel as the 0-3 and some other people were going to sit in. I learned this from Capt. Suciu my military defense counsel. He doesn't know why it was cancled. Perhaps a mistake was made. I'll check.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-77

DOUGLAS JAMES FARRELL and MARK ALBERT ROY,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals in *Roy* (Pet. App. A1) is reported at 441 F.2d 1165. The opinion of the court of appeals in *Farrell* (Pet. App. A3) is not yet reported.

JURISDICTION

The judgment of the court of appeals in *Roy* was entered on May 13, 1971; the judgment of the court of appeals in *Farrell* was entered on May 25, 1971.

Petitions for rehearing were denied on June 15, 1971, and June 16, 1971, respectively. The consolidated petition for writs of certiorari was filed July 14, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioners' contention that the Department of the Army, contrary to the assurance given to this Court by its General Counsel in *Ehlert*, might in the future refuse to consider post-induction-notice conscientious objector claims is sufficient ground for reconsideration of *Ehlert* in the circumstances of these cases.

STATEMENT

After separate non-jury trials in the United States District Court for the Central District of California, petitioners were convicted of wilfully refusing to submit to induction into the armed forces, in violation of 50 U.S.C. App. 462(a). Petitioner Farrell was sentenced to the custody of the Attorney General for two years and petitioner Roy was sentenced to the custody of the Attorney General for three years. The court of appeals affirmed both convictions *per curiam* (Pet. App. A1, A3).

1. Petitioner Farrell registered with his local board in Beloit, Wisconsin, on October 14, 1960 (F-SSF 1).[1]

[1] "F-SSF" refers to petitioner Farrell's Selective Service File, which is on file with the Clerk of this Court; "R-SSF" refers to petitioner Roy's Selective Service File, also on file with the Clerk of this Court.

He received a student (II-S) deferment from November 18, 1963, to March 21, 1966, when he was reclassified II-A (occupational deferment), because of his employment at Bendix corporation. Farrell retained this classification until November 13, 1967, when, having terminated his employment with Bendix, he was placed in Class I-A (F-SSF 11). On February 5, 1968, Farrell's local board was informed by Rantec Corporation that it had employed him on January 30, 1968; it requested that he be reclassified II-A. This request was considered by the local board and denied on February 17, 1968 (F-SSF 12); Farrell appealed to the State Appeal Board which reviewed his file *de novo* and, on May 2, 1968, voted unanimously to retain him in Class I-A (F-SSF 58, 63, 69, 70).

On May 23, 1968, Farrell was mailed an order to report for induction on June 14, 1968 (F-SSF 12, 72). The next day, his local board received a telegram (F-SSF 74), in which he requested the Special Form for Conscientious Objectors (SSS Form 150), asserting, "[I] finally made up my mind." The form was mailed and Farrell's induction was postponed for 30 days (F-SSF 12); he completed the form and returned it to his local board. On June 17, 1968, the local board notified Farrell that it had decided not to reopen his classification because it had found that there was no change in status resulting from circumstances beyond his control (F-SSF 12, 81). He was ordered to report for induction on August 14, 1968, and, on that date, Farrell reported for, but refused to submit to, induction. The indictment and conviction followed, and the court of appeals affirmed.

2. Petitioner Roy registered with his local draft board in 1966 (R-SSF 1, 2). On April 29, 1966, he submitted a classification questionnaire but made no request for exemption or deferment (R-SSF 4, 7); he was classified I-A (R-SSF 11). Roy was ordered to report for induction on March 12, 1968, but he advised the board that he was unable to do so because of sickness (R-SSF 19, 20). He subsequently was ordered to report for induction on April 16, 1968, on June 20, 1968, and on October 15, 1968, respectively (R-SSF 21, 23, 28); each time he failed to report. On October 21, 1968, Roy notified the board that he was in jail on October 15, 1968, and therefore unable to report (R-SSF 33).

On November 19, 1968, Roy was mailed an order to report for induction on December 10, 1968 (R-SSF 35). On December 2, he for the first time requested the Special Form for Conscientious Objectors (SSS Form 150); he completed and returned the form the same day (R-SSF 36, 37-44). Roy's induction was postponed, and his local board accorded him a "personal interview" on January 7, 1969 (R-SSF 47). Thereafter, it notified Roy that it had decided not to reopen his classification because it had found that there was no change in status resulting from circumstances beyond his control (R-SSF 12, 48). He was ordered to report for induction on May 13, 1969 (R-SSF 52). He reported for, but refused to submit to induction (R-SSF 56-57). The indictment and conviction followed, and the court of appeals affirmed.

ARGUMENT

In both cases, the court below held that the local boards' refusals to reopen petitioners' I-A classifications to consider their belated conscientious objector claims were proper under this Court's ruling in *Ehlert* v. *United States*, 402 U.S. 99. In *Ehlert*, this Court held that consideration of post-induction-notice conscientious objector claims is not to be undertaken by local boards of the Selective Service System; rather the appropriate forum for review of such claims is within the military after the registrant has submitted to induction.

Petitioners ask this Court to reconsider its decision in *Ehlert* on the ground that the Army might not continue to adhere to the assurance given to this Court by its General Counsel in *Ehlert*—*i.e.*, that the Army's present practice is to entertain conscientious objector claims made after submission to induction which are based on professed beliefs that allegedly matured after Selective Service mailed the claimant a notice of induction but prior to the scheduled induction date. That same argument, however, was made in *Ehlert*; this Court there stated (402 U.S. at 107), "if, contrary to that assurance, a situation should arise in which neither the local board nor the military had made available a full opportunity to present a *prima facie* conscientious objection claim for determination under established criteria * * * a wholly different case would be presented."

We know of no such case. Nor have petitioners suggested otherwise. All of the authorities that they cite (Pet. 9-15) involve conscientious objector claims, raised for the first time by servicemen following their enlistment or induction, which were denied only after the claim had been fully considered by the military. Not one involves a summary denial by the military of such a claim because it had earlier been tendered to Selective Service during the "hiatus period" discussed in *Ehlert*.

Nor is that the situation in the instant cases.[2] If, as petitioners speculate, the Army should in the future refuse to consider post-notice conscientious objector claims under the Department of Defense directive (1300.6) and its own regulations (AR 635-20), relief should be by habeas corpus after induction, and reconsideration of *Ehlert* should appropriately await such time as general disregard by the military of the assurances relied on in *Ehlert* is established. See *Nix* v. *United States*, 437 F.2d 746 (C.A. 9), certiorari denied, No. 1543, October Term, 1970, decided May 24, 1971; *Bender* v. *United States*, C.A. 9, No.

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[2] Petitioners did not submit to induction. Had they done so, and had the Army then summarily denied their claims on the ground that they had been tendered to Selective Service during the "hiatus period," they could have obtained appropriate relief in habeas corpus proceedings. Cf. *Morrison* v. *Larsen*, C.A. 9, No. 26,869, decided July 28, 1971, where such an argument was considered and rejected by the Ninth Circuit on the ground that the *Ehlert*-type claim had been properly denied by the military because it rested on beliefs that ripened well before the claimant was mailed his notice of induction.

24,312, decided April 29, 1971, certiorari denied, No. 284, October Term, 1970, decided May 17, 1971.[3]

CONCLUSION

It is therefore respectfully submitted that the consolidated petition for writs of certiorari should be denied.

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AUGUST 1971.

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[3] Petitioners' contention that servicemen seeking discharge from the military on grounds of conscientious objection are sometimes denied procedural due process because their claims are considered by hearing officers who are not "knowledgeable," contrary to the requirement in DOD 1300.6 and in AR 635-20, is not relevant to the instant cases. Such an infirmity in the administrative processing of conscientious objector claims is not present here, since petitioners refused to submit to induction; thus the military never had an opportunity to consider their claims. If such a case should arise in which that situation does exist, this Court can appropriately consider the issue in a habeas corpus action at that time.

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IN THE

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OCTOBER TERM, 1971

No. 70-341

RONALD DALE TAGGART, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

No. 71-77

DOUGLAS JAMES FARRELL, *Petitioner,*

vs.

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No. 71-77

MARK ALBERT ROY, *Petitioner,*

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vs.

UNITED STATES OF AMERICA, *Respondent.*

SEPTEMBER, 1971 SUPPLEMENT TO PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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This Supplement is to present to the Court a new, not heretofore available government document to further show,

we now trust conclusively, that the holding of *Ehlert* v. *United States,* 402 U.S. 99, 91 S.Ct. 1319 (1971), should not apply to men like these petitioners, men who, at the time they were ordered to report for induction, were in a no-man's-land posture.

Ehlert said:

> "We are assured, however, by a letter included in the briefs in this case from the General Counsel of the Army to the Department of Justice, that present practice allows presentation of such claims and that there thus exists no possibility that late crystallizers will find themselves without a forum in which to press their claims. *Our conclusion in this case is based upon that assurance.*" 91 S.Ct. 1319, 1324-1325. [Italics supplied]

The following chronology is presented as significant:

1. At all times concerned[1] with *Ehlert* and up to August 20, 1971 the Department of Defense Directive 1300.6 read:

> IV. B2.
>
> A request for discharge after entering military service based solely on conscientious objection which existed but was not claimed prior to induction or enlistment cannot be entertained. Similarly, requests for discharge based solely on conscientious objection claimed and denied by the Selective Service System prior to induction cannot be entertained. This accords with Federal court holdings that a claim to exemption from military service under the Selective Service laws must be interposed prior to notice of induction and failure to make timely claim for exemption constitutes waiver of the right to claim. However, claims based on conscientious objection growing out of experience

1. Compare *Wright* v. *Selective Service System,* 8 Cir., 1971, 444 F.2d 83, f.2, 84.

prior to entering military service, *but which did not become fixed until entry into the service* will be considered. [Italics supplied]

2. Soon after *Ehlert* was decided the United States Court of Appeals began affirming the convictions (of cases pending on its docket) of *Ehlert*-type appellants.

The first, Taggart (No. 70-341) filed a Petition for a Writ of Certiorari on June 26, 1971, arguing in it (and in his Supplement) that an unbroken line of three dozen cases had dealt with the factual question of armed service procedures and that all held that where a man's conscientious objections had become fixed *before* entering the service his application would be rejected.

Subsequently, the above argument was repeated by others, filing similar petitions (Farrell, No. 71-77, Roy, No. 71-77 and Kilty No. 71-290) and the argument was elaborated as new and more recent (current) evidence of military practice come to light.

3. Then, on August 20, 1970, the Department of Defense amended its directive DoD 1300.6 conforming to the above-related assurance given the Court by the General Counsel of the Army. This amendment now gives a forum to men postured like petitioners were.

Petitioners, at the time they were called upon to submit to induction, had no forum.

Subparagraph IV A 2, the correlative portion of the amendment to former IV B 2 is brand new. Paragraph IV now reads:

Aug 20, 71
1300.6

IV. *POLICY*

A. Administrative discharge prior to the completion of an obligated term of service is discretionary with

the Military Service concerned, based on a judgment of the facts and circumstances in the case. However, insofar as may be consistent with the effectiveness and efficiency of the Military Services, a request for classification as a conscientious objector and relief from or restriction of military duties in consequence thereof will be approved to the extent practicable and equitable within the following limitations:

1. Except as provided in Section IV.A.2. of this Directive, no member of the Armed Forces who possessed conscientious objection beliefs before entering military service is eligible for classification as a Conscientious Objector if

   (a) (1) such beliefs satisfied the requirements for classification as a Conscientious Objector pursuant to Section 6(j) of the Universal Military Training and Service Act, as amended (50 U.S.C. App. 456(j)) and other provisions of law, and (2) he failed to request classification as a Conscientious Objector by the Selective Service System; or

   (b) (1) he requested classification as a Conscientious Objector before entering military service, and (2) such request was denied on the merits by the Selective Service System, and (3) his request for classification as a Conscientious Objectpr is based upon essentially the same grounds, or supported by essentially the same evidence, as the request which was denied by the Selective Service System.

2. Nothing contained in this Directive renders ineligible for classification as a Conscientious Objector a member of the Armed Forces who possessed Conscientious Objector beliefs before entering military service if (a) such beliefs crystalized after receipt of an induction notice; (b) he could not request classification as a Con-

scientious Objector by the Selective Service System because of Selective Service System regulations prohibiting the submission of such requests after receipt of induction notice; and (c) he makes application for classification as a Conscientious Objector within seventy-two (72) hours after his induction.

B. Because of the personal and subjective nature of conscientious objection, the existence, honesty, and sincerity of asserted conscientious objection beliefs cannot be routinely ascertained by applying inflexible objective standards and * * *.

It is submitted that certiorari should be granted.

Respectfully,

J. B. TIETZ
Attorney for Petitioner

September 15, 1971